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International Decisions: Well Blowout Control Claim. UN Doc. S/AC.2/DEC.40, 36 ILM 1343 (1997). United Nations Compensation Commission, Governing Council, December 17, 1996.

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The opinions in this case are a veritable treasure trove of international law, with significant pronouncements concerning areas as diverse as the development and interpretation of international law, criminal procedure and substantive international criminal law. The case also provides insights into the difficulties posed in reconciling different civil law and common law traditions, not only for the judges of an international criminal tribunal, but also for attorneys and defendants who may lack familiarity with international criminal law concepts, such as war crimes and crimes against humanity, and who may also be required to consider concepts derived from municipal criminal law and procedure that are, to them, quite foreign. In view of these difficulties, it is reassuring to observe the lengths to which the judges will go to ensure that the accused receive a fair trial.

One of the many noteworthy aspects of this case concerns the requirements for the defense of duress, enumerated by both Judge Li and Judge Cassese. They agree upon three, but Judge Cassese adds a fourth requirement: that the situation leading to duress must not have been voluntarily brought about by the person coerced. This fourth requirement could be applied to those who knowingly and voluntarily join a military unit, organization or group engaged in illegal activity,<sup>39</sup> even if the victims were destined to perish regardless of the accused's participation.

Such an application would seem to address the concerns of the majority. For example, it could prevent a member of a group of kidnappers from escaping responsibility for killing one of the hostages. At the same time, it could protect a hostage who is forced to kill others. It could also provide a basis for reconciling the views of the judges, namely, that regardless of whether duress constitutes a defense to charges of murder in general, for a combatant who voluntarily and knowingly joined an organization notorious for its purposeful violation of international humanitarian law, no such defense is possible. Given the facts of this case, where the appellant, an ethnic Croat, seemingly of his own volition joined the Bosnian Serb army, which is known for committing offenses under humanitarian law in an arguably institutionalized fashion, such a result would seem appropriate.

Seen in this light, the gap between the judges seems to concern whether combatants charged with unlawful killings should be precluded as a matter of *law* from interposing the defense of duress, or whether a trial chamber should, on the facts, be able to bar the application of this defense if it determines that the requisite conditions have not been satisfied, in particular if it finds that the situation leading to duress was voluntarily brought about by the accused.

OLIVIA SWAAK-GOLDMAN  
*Iran—United States Claims Tribunal*

*Armed conflict—losses resulting from invasion and occupation of Kuwait—oil well fires—liability for damages—causation—mitigation of damages—abatement of environmental damage—standing—parties—duplication of claims*

WELL BLOWOUT CONTROL CLAIM. UN Doc. S/AC.2/Dec.40, 36 ILM 1343 (1997).  
United Nations Compensation Commission, Governing Council, December 17, 1996.

Among the more memorable images of the Persian Gulf war is the sight of hundreds of oil wells set aflame by Iraqi troops as they fled from Kuwait in March 1991. The Kuwait Oil Company (KOC), a subsidiary of the state-owned Kuwait Petroleum Corporation

<sup>39</sup> Such an application is, in fact, advocated by Judge Cassese, who highlights its particular relevance to warlike situations.

(KPC), claimed compensation totaling approximately \$952 million for the cost of planning, extinguishing the wellhead fires, the initial sealing of the wells, and ensuring the safety of the wellheads so that work on resuming production could begin.<sup>1</sup> On December 17, 1996, the Governing Council of the United Nations Compensation Commission (UNCC) approved the recommendations of the Panel of Commissioners appointed to review the *Well Blowout Control Claim* and awarded approximately \$610 million to KOC.<sup>2</sup>

UN Security Council Resolution 687 provides that "Iraq . . . is liable under international law for any direct loss, damage, including environmental damage . . . or injury . . . as a result of Iraq's unlawful invasion and occupation of Kuwait."<sup>3</sup> The Governing Council had previously determined that "expenses directly relating to fighting oil fires" are compensable.<sup>4</sup> The questions in this case—as in all UNCC cases—concern causation and damages: whether "all the costs . . . can be considered a direct result of Iraq's invasion and occupation of Kuwait" and whether "the costs for which compensation is being sought . . . have in fact been incurred by the Claimant."<sup>5</sup>

The costs incurred by KOC were ultimately funded by the Kuwaiti Ministry of Oil. When asked for clarification on its standing to pursue a claim for costs that ultimately were borne by another entity, KOC indicated that, as the sole Kuwaiti oil sector company responsible for bringing the damaged oil wells under control, it was bringing the claim "on its own behalf and not on behalf of the State." Surprisingly, the panel essentially rejected this assertion and relied on the annual report of the KPC, which stipulated that "[KPC] and its subsidiaries perform certain activities on behalf of the Ministry of Oil," to hold that "KOC in all its operations acts . . . on behalf of the Ministry of Oil."<sup>6</sup> Accordingly, the

Panel concludes that the [well blowout] Claim must be deemed to have been made by KOC on behalf of Kuwait's public oil sector as a whole. Consequently, the Panel determines that the Government of Kuwait as well as KPC will be bound by the decision to be rendered by the UNCC in this Claim and thus they will be estopped from bringing the same claim before the UNCC.<sup>7</sup>

The panel essentially found that KOC met the legal requirements of standing because KOC was the injured party: it represented the larger interests of the Kuwaiti oil industry, which had suffered a cognizable injury. More problematic is the panel's reasoning that to avoid the possibility of double recovery, it was necessary to make its decision binding on KPC and the Government of Kuwait, despite the panel's earlier conclusion that neither was a co-claimant. The rules governing the panel's decisions posit exactly the

<sup>1</sup> KOC claims for lost revenues and the cost of rebuilding the oil wells and resuming production are the subject of related proceedings and were not addressed in this decision.

<sup>2</sup> For the text of the executive summary of the Report and Recommendation of the Panel of Commissioners, see UN Doc. S/AC.26/1996/5. For the full text of the Report and Recommendation of the Panel of Commissioners, see UN Doc. S/AC.26/1996/5/Annex, 36 ILM 1343 (1997) [hereinafter Decision]. Citations to the panel's decision refer to the full text of the report.

<sup>3</sup> SC Res. 687 (Apr. 8, 1991), 30 ILM 847 (1991), para. 16.

<sup>4</sup> UN Doc. S/AC.26/1991/7/Rev.1, para. 35 (1992) [hereinafter Decision 7]. Governing Council Decision 7 determined that with respect to *government* claims, payments are available for "losses or expenses resulting from . . . [a]batement and prevention of environmental damage, including expenses directly relating to fighting oil fires"—precisely the type of loss for which KOC was seeking damages. But here the panel faced the issue of KOC's submission as a *corporate* claim. The panel concluded, inter alia, that the Governing Council could not have intended to deny subject matter jurisdiction to a claim clearly cognizable under Resolution 687, and that in any event other provisions of Governing Council Decision 7 render KOC's corporate claim compensable as a loss suffered as a result of "[a]ctions by officials, employees or agents of the Government of Iraq or its controlled entities." Decision, 36 ILM at 1351–52, paras. 51–54.

<sup>5</sup> Decision, 36 ILM at 1356, para. 87.

<sup>6</sup> *Id.* at 1352–53, paras. 57, 60.

<sup>7</sup> *Id.* at 1353, para. 61.

opposite: the award is “final and binding on the parties.”<sup>8</sup> The more traditional response to assuage Iraq’s concern regarding double recovery would have been to address the issue only in the event of a future proceeding in which KPC and the Government of Kuwait sought compensation for the same losses for which compensation had already been awarded to KOC, and to deny such recovery in that context.<sup>9</sup>

KOC asserted that the withdrawing Iraqi forces had deliberately set fire to the Kuwaiti oil wells. Iraq asserted that the oil wells had been damaged as a result of allied bombing by coalition forces or, alternatively, by explosives planted on the oil wells by Iraq’s enemies “in order to incriminate Iraq and throw the responsibility of the firing of the oil wells on the Iraqi Armed Forces.”<sup>10</sup> Iraq argued that the loss claimed was therefore not the “direct” result of Iraqi action because the chain of causation had been broken by intervening events. KOC replied that, even assuming that some of the oil wells were set afire by allied bombing, Iraq would still be liable to compensate Kuwait, as the Governing Council had previously ruled that Iraq is liable for any loss suffered as a result of “military operations or threat of military action by either side.”<sup>11</sup>

The panel found that “the bulk of the oil-well fires was directly caused by the explosives placed on the wellheads and detonated by Iraqi armed forces.” Furthermore, even assuming that some of the oil wells may have been set afire because of allied bombing, the panel also rejected Iraq’s argument that the chain of causation would have been broken thereby, finding that Iraq was liable for any direct loss, damage or injury suffered as a result of military operations of either side. Consequently, the panel found Iraq liable for any direct loss whether “caused by its own or by the coalition armed forces.”<sup>12</sup>

The determination as to causation may prove to be one of the more significant contributions of the panel’s decision. Resolution 687 imposes the requirement that all loss arising from Iraq’s unlawful invasion of Kuwait must be “direct.” There is a widespread belief, however, that the distinction between “direct” and “indirect” loss first drawn by the international tribunal in *Alabama Claims* has not been particularly helpful.<sup>13</sup> International tribunals have repeatedly wrestled with the distinction between “direct” and “indirect” loss, and have not found consensus as to which losses fall into one or the other category.<sup>14</sup>

In the famous *War-Risk Insurance Premium Claims* case of 1943, the umpire of the German–United States Mixed Claims Commission addressed the question of whether certain insurance premiums paid to insure against losses associated with World War I were “loss[es] attributable to Germany’s act as a proximate cause.”<sup>15</sup> Noting that Germany’s liability under the Treaty of Berlin was limited to losses “caused by the acts of

<sup>8</sup> UNCITRAL Arbitration Rules, Art. 32(2), reprinted in 15 ILM 701 (1976) (emphasis added).

<sup>9</sup> Decision 7, *supra* note 4, para. 39 (“Any compensation, whether in funds or in kind, already received from any source will be deducted from the total amount of losses suffered.”).

<sup>10</sup> Decision, 36 ILM at 1356, para. 82.

<sup>11</sup> *Id.* at 1354–55, paras. 73–79.

<sup>12</sup> *Id.* at 1356, paras. 85–86.

<sup>13</sup> See *War-Risk Insurance Premium Claims*, 7 R.I.A.A. 44, 62–63 (1923) (“The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law.”) (citing *Alabama Claims*, reprinted in 1 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS 646 (1898)).

<sup>14</sup> Indeed, some of the losses considered to be “direct” and therefore eligible for compensation by the UNCC—such as losses arising from the breakdown of civil order in Kuwait or Iraq—have been considered to be “indirect” in the past. See Decision 7, *supra* note 4, para. 21; Boxer Indemnities Claims Commission, reprinted in 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1781 (1943). On the other hand, some of the losses considered to be “indirect” and therefore ineligible for compensation by the UNCC—such as losses suffered as a result of the trade embargo and related measures—have been considered to be “direct” in the past. See Report and Recommendation Made by the Panel of Commissioners Concerning the Egyptian Workers’ Claims (Jurisdictional Phase), UN Doc. S/AC.26/1995/R.20/Rev.1, at 77.

<sup>15</sup> *War-Risk Insurance Premium Claims*, 7 R.I.A.A. at 55.

Germany or her agents," the umpire rejected claims for war-risk insurance premiums, reasoning that

it is evident that during the period of neutrality *both* groups of belligerents freely resorted to "retaliatory measures" to the detriment of all neutral commerce . . . ; and in both theory and practice . . . the American nationals insured against the risk created by the acts of *both groups*; risks inevitably incident to the very existence of a state of war. Obviously it is impossible, therefore, to attribute these risks to the acts of Germany without holding her liable for all the consequences of the war, which under the Treaty is not permissible.<sup>16</sup>

The panel in the instant case, by contrast, held that for a loss to be compensable, the injurious action need not be attributable to Iraq or its agents.<sup>17</sup> This interpretation comports with the language of Resolution 687, which holds Iraq liable under international law for any direct loss, damage or injury *as a result* of its unlawful invasion and occupation of Kuwait.<sup>18</sup> Thus, under UNCC jurisprudence, the issue is not whether the loss was due to an *act* of Iraq or its agents, but whether the losses were "the *result* of Iraq's unlawful invasion and occupation of Kuwait" and "the causal link [was] direct."<sup>19</sup>

One of the few instances in which the panel refused to find a direct loss resulting from Iraq's invasion and occupation of Kuwait was with respect to KOC's payments to firefighters who were regular staff members of KOC. Notwithstanding the Governing Council's statement in Decision 7 that "expenses directly related to fighting oil fires" are compensable, the panel concluded that, because KOC was obliged to pay its permanent employees their normal salaries, the loss did not "directly relate" to the fighting of such oil fires. Put differently, the payment of salaries to permanent personnel was not the "result" of Iraq's unlawful acts because KOC would have incurred those expenses regardless of the circumstances surrounding the gulf war.

This is one of the more significant claims brought before an international tribunal for reimbursement of reasonable expenses incurred in mitigating damages. As the panel noted,

under the general principles of international law relating to mitigation of damages, . . . the Claimant was not only permitted but indeed obligated to take reasonable steps to fight the oil-well fires in order to mitigate the loss, damage or injury being caused by those fires to the property of the Kuwaiti oil sector companies and the State of Kuwait.<sup>20</sup>

To the extent claimants do attempt to mitigate damages, they are entitled to recover reasonable expenses associated with such efforts.<sup>21</sup> The rationale behind these rules is that, while the aggrieved party must attempt to minimize damages owed by the breaching party, such attempts must not result in a loss to the aggrieved party.<sup>22</sup>

<sup>16</sup> *Id.* at 63.

<sup>17</sup> See Decision, 36 ILM at 1356, para. 86 (in accordance with general principles of international law, Iraq's liability includes any direct loss, damage or injury suffered as a result of military operations or threat of military action by either side); see also Decision 7, *supra* note 4, para. 21 (holding Iraq liable for conduct of other parties, such as "[m]ilitary operations or threat of military action by *either side*") (emphasis added)).

<sup>18</sup> For the passage in question, see text at note 3 *supra*.

<sup>19</sup> UN Doc. S/AC.26/1992/15, para. 3 (emphasis added) [hereinafter Decision 15].

<sup>20</sup> Decision, 36 ILM at 1352, para. 54. This conclusion comports with earlier Governing Council decisions that have concluded that "[t]he duty to mitigate damages applies to all claims." See Decision 15, *supra* note 19, para. 9.

<sup>21</sup> It is a general principle of international law that "[t]he aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm." See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Art. 7.4.8 (1994) [hereinafter UNIDROIT Principles]; see also *FMC Corp. v. Ministry of National Defence*, AWD 292-353-2, 14 Iran-U.S. Cl. Trib. Rep. 111, 124 (1987).

<sup>22</sup> UNIDROIT Principles, *supra* note 21, Art. 7.4.8, cmt. 2.

One of the fundamental questions presented to the panel was, what constitutes a “reasonable expense” incurred in mitigating damages? KOC stated that it had employed its “best efforts to control costs” by using, among other things, competitive tendering, negotiated contracts, KOC approval of purchases, and cost-controlled operational systems.<sup>23</sup> It argued that the chaotic and dangerous conditions in Kuwait at the time, as well as the urgent need to extinguish the fires and resume production, had resulted in KOC’s incurring premium charges from contractors.<sup>24</sup> Iraq argued that the premium charges incurred because of the unusual circumstances—compared with the average rates normally charged for such services—rendered the cost data provided by KOC unreliable and insufficient. The panel concluded that “in the circumstances prevailing in Kuwait in the aftermath of the Gulf War it may have been necessary for the Claimant to pay a higher price than what would have been otherwise payable for the services in question,” and that “the Claimant has taken reasonable steps to control any excessive pricing of these services.”<sup>25</sup> It specifically recognized that

appropriate procedures, such as competitive tendering, the requirement of KOC approval for purchases made through [contractors], and accounting and cost control systems were employed by the Claimant to control the costs and to keep them at a reasonable level in the extraordinary circumstances prevailing in Kuwait in the aftermath of the Gulf War.<sup>26</sup>

Not a single element of KOC’s claim for costs was rejected as excessive under the circumstances.<sup>27</sup>

The importance of the panel’s decision as to mitigation of damages is twofold. First, the panel suggests that, even the existence of extraordinary circumstances does not obviate a claimant’s responsibility to take reasonable steps to control the costs of mitigation. Of course, the steps required in extraordinary circumstances may be less demanding than those required under normal circumstances, recognizing that in minimizing one’s losses one need not take undue risk or expense.<sup>28</sup> Second, the panel not only confirmed that claimants are to be reimbursed for reasonable expenses incurred in mitigating damages, but also clarified that what constitutes a “reasonable expense” will depend in large measure upon the prevailing circumstances. That is, what constitutes a reasonable expense in “extraordinary circumstances” may well not be reasonable under normal circumstances. In this case, the panel ultimately concluded that, given the extraordinary circumstances, \$610 million was not an unreasonable amount to reimburse KOC for the expenses it had incurred in minimizing the destruction to Kuwaiti oil wells wrought by Iraqi troops.

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*Hogan & Hartson, L.L.P.*

<sup>23</sup> Decision, 36 ILM at 1349, para. 34.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1365, para. 149.

<sup>26</sup> *Id.* at 1361, para. 117 (emphasis added).

<sup>27</sup> A significant portion of KOC’s claim, approximately \$337 million, was deferred for resolution by subsequent panels. Those claims, however, were not rejected on the grounds that they were unreasonable or unverifiable. Rather, verification of those claims was to be made by subsequent panels charged with resolving KOC’s other claims. See, e.g., *id.* at 1363–64, 1376, paras. 137, 233.

<sup>28</sup> *Yeager v. Islamic Republic of Iran*, AWD 324-10199-1, 17 Iran-U.S. Cl. Trib. Rep. 92, 108 (1987) (claimant forcibly expelled from Iran by military authorities under no obligation to mitigate damages by selling or shipping personal effects).